In the Supreme Court of the United States

OCTOBER TERM 1942.

No. 750.

In the Matter of
THAD BENSON CARTER,
Farmer Debtor.

THAD BENSON CARTER,
Petitioner,

vs.

GEORGE A. KUBLER,
Respondent.

BRIEF FOR RESPONDENT, GEORGE A. KUBLER, Opposing Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

T. W. KIMBER of
MUSSER, KIMBER & HUFFMAN,
503 Flatiron Building,
Akron, Ohio,
Attorney for Respondent,
George A. Kubler.

ELMER MCCLAIN,
Lima, Ohio,
Attorney for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 5647.

INDEX.

I. The Issue 1

II. Additional Statement 2

III. Finding and Judgment of the District Court 4

IV. The Judgment of the United States Circuit Court of Appeals for the Sixth Circuit 6

V. Reply Argument 7

1. 1936 Appraisement 8

2. Statement Made in Commissioner's Report .. 8

3. Time for Redemption 9

VI. Evidence as to Valuation 9

VII. Conclusion 10

AUTHORITIES CITED.

Case.

Wright vs. Union Central, 311 U. S. 273 ..... 2, 3

Statute.

Bankruptcy Act, Section 75s 1, 2

In the Supreme Court of the United States

OCTOBER TERM 1942.

No. 750.

In the Matter of
THAD BENSON CARTER,
Farmer Debtor.

THAD BENSON CARTER,
Petitioner,

vs.

GEORGE A. KUBLER,
Respondent.

BRIEF FOR RESPONDENT, GEORGE A. KUBLER, Opposing Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

I. THE ISSUE.

The question in issue in this cause and in the Courts below was, what is the present fair and reasonable appraised value of the 168-acre Carter farm under Section 75s of the Bankruptcy Act.

On hearing, the Federal District Court, Northern District of Ohio, Eastern Division, Judge Jones presiding, fixed the appraised value of the farm at $20,000.00, approximately $119.00 per acre.

The judgment of the District Court was affirmed by the United States Circuit Court of Appeals, Sixth Circuit, Cincinnati, Ohio, as more fully hereinafter set forth.

II. ADDITIONAL STATEMENT.

A few additional facts leading up to the present controversy may be helpful to the Court to fully present the present issue.

This cause was first filed in the Bankruptcy Court in the Federal District Court at Cleveland, Ohio, on December 21, 1934.

On July 1, 1929, Carter, the farm debtor, had secured a first mortgage loan on his 168-acre farm at Macedonia, Summit County, Ohio, for $16,000.00 due and payable within three years from said date.

Carter first sought to obtain composition of his creditors under the bankruptcy statute for an extension of time to meet his debt obligations.

Failing to secure such acceptance, Carter, on January 8, 1936, filed his bankruptcy proceedings in such Court under Section 75s of the Bankruptcy Act and applied for, and received by order of the Court, a 3-year moratorium time within which to redeem his farm at the then appraised value.

When the 3-year moratorium period was granted to Carter, he was ordered to pay a certain tax or rental value during the period of the moratorium on the basis of a valuation of the land fixed by the Commissioner appointed by the Court, and in the arrival at the valuation amount the secured creditor had no part, and no opportunity of offering evidence for that purpose was afforded to him.

Following such rental and tax order, Carter, after practically one year, defaulted in the payment of such rental and failed to pay any and all taxes, either delinquent or current, assessed against said farm lands.

After the 3-year moratorium period, the secured creditor in said Federal Court again urged that further proceedings should be had to protect his mortgage lien.

At about that time, and on December 9, 1940, the Supreme Court of the United States, in the case of *Wright*

vs. Union Central, 311 U. S. 273, announced its decision, holding in substance that an opportunity should first be given to a farm debtor to redeem the lands at the value fixed by the Court before a public sale should be ordered.

Thereafter, his Honor, Judge Jones of the United States District Court at Cleveland, Ohio, directed that all subsequent proceedings of this cause were to conform to such opinion, and granted to the farm debtor, as well as to the secured creditor, the right to have the land appraised at its then fair and reasonable market value, with the first right to the farm debtor to purchase it at such appraised value, and, failing to do so, that a public sale of the land then be had.

It should also be stated that, both Carter, the farm debtor, and George A. Kubler, the secured mortgage holder, filed with the Court their application to have the farm appraised.

The Court, considering such two applications, made the following order on March 21, 1941:

> "IT IS THEREFORE ORDERED that this matter be referred to the Conciliation Commissioner who is directed to have a re-appraisement of the farm made and that the secured creditor be afforded an opportunity to present evidence as to the present fair value of such farm and that the Conciliation Commissioner determine the correct appraised value and fix a reasonable time within which the Debtor shall redeem the farm from the mortgage lien, failing in which a public sale is ordered.
>
> (Signed) JONES,
> *United States District Judge.*"

Pursuant to such order, both the farm debtor and the secured creditor offered evidence before the Commissioner as to the then fair and reasonable market value of the farm in question, it being stipulated that five witnesses might be called by either party.

III. FINDING AND JUDGMENT OF THE DISTRICT COURT.

Thereafter, a transcript record of the evidence of the several witnesses, together with briefs by counsel, were submitted to the Court, with the recommendation of the Commissioner that the farm value be found at the rate of $150.00 per acre.

His Honor, Judge Jones, reviewed the evidence and arrived at the conclusion that the fair and reasonable market value of the farm was $20,000.00 ($119.00 per acre).

Inasmuch as the sole and only question, as we view this controversy, is one involving a finding of fact, we submit herewith the opinion of the Court as follows:

"JONES, *J.*:

"This proceeding is to review a reappraisement made pursuant to an order of the Court entered March 21, 1941. The sole question presented is one of fact based upon the Conciliation Commissioner's determination of the fair and reasonable value of the debtor's farm. The Commissioner, after hearing testimony of persons called by the farmer-debtor and the secured creditor, made a finding that the fair and reasonable value of the farm, upon reappraisement, is $150.00 per acre. His order fixing such value was made sometime in August of 1941 and the debtor was given until October 15, 1941, to redeem. The debtor challenges the correctness of the Commissioner's findings principally on the ground that the fair value as found by the Commissioner is far in excess of the present fair and reasonable market value and of the original appraisement made some years before (perhaps three years). However, that value, the Commissioner stated, was made for taxation purposes.

The farm in question is in Macedonia, Summit County, Ohio, at the corner of Ledge and Sheppard Roads, the former being an improved highway and the latter a town line road. It consists of 168 acres-plus and is approximately 18 miles from Cleveland and a little farther than that from Akron, Ohio. There are a house and a barn on the farm and some 40 acres

of timber land. It was stated by one of the witnesses that the buildings are not in very usable condition and that the fences are very ordinary. The values given by the witnesses called by the secured creditor ranged from approximately $29,000.00 to $33,000.00. The values given by the witnesses called for the farmer-debtor were from $6,500.00 to $12,000.00. This is a wide discrepancy, indicating a broad divergence of opinion as to the value of the farm. Thus is presented a difficult situation to those called upon to make a finding of fair and reasonable market value.

After reading the testimony, it does seem to me that the appraisal is high on the basis of today's conditions and market for farm lands located as this one is. True, it is upon a secondary but improved highway and approximately midway between the populous communities of Cleveland and Akron, and it would seem to border on or lie just outside of the so-called Cleveland metropolitan area. The buildings and fences are probably of little value for appraisal purposes and the timber land probably the same.

Giving effect to all elements upon which the evidence rests, I think that the appraisal is somewhat high, but this is not to say or to intimate that either the secured creditor or the Commissioner overreached or attempted to defeat the farmer-debtor in his opportunity or effort for redeeming his farm. A review of the testimony gives the impression that there is not an active market for farm land, in this location at least, although it has improved somewhat within the last two or three years. While it may be possible that the land has a potential value for development into the country place class, if and when conditions favorable for such development return, yet it is to be seriously doubted that such a market value ever will exist and it must be regarded as merely speculative, as matters stand. There are no present or prospective developments to justify a fair market value upon such basis. Generally, the rule is that the fair market value is the price which a willing seller could reasonably expect to obtain from a desirous buyer, neither being under necessity.

Viewing the whole matter in an effort to approach and fulfill the duty of the Court under the statute, I think the fair and reasonable market value of the farm, under the evidence before me, is $20,000.00, and I so find and conclude. Since the original date for redemption fixed by the Commissioner expired on October 15, 1941, a new date is hereby fixed. The debtor is given until December 15, 1941, to redeem, failing in which the property shall be sold at public sale.

JONES,
U. S. District Judge.

November 7, 1941."

Such finding and judgment of the Court was journalized November 17, 1941.

Upon application by the attorney for the farm debtor for rehearing, the Court, on December 9, 1941, adhered to his former order and judgment.

IV. THE JUDGMENT OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Counsel for the farm debtor filed his notice for appeal of this cause from the District Court to the United States Circuit Court of Appeals, Sixth Circuit, Cincinnati, Ohio.

The brief filed in that appellate Court on behalf of the farm debtor urged substantially the same reasons and argument as is set forth in the brief filed in this Court for an order of certiorari.

The appellate Court affirmed the judgment of the Federal District Court without written opinion.

In the Order of that Court of October 14, 1942, is the following:

"Before: Hicks, Simons and Martin, Circuit Judges.

This cause was heard upon the transcript of the record, briefs and arguments of counsel, and it appearing that there was no abuse of judicial discretion in the finding that the reasonable market value of the farm land in question was $20,000, and no reversible error appearing,

IT IS ORDERED AND ADJUDGED that the judgments and orders appealed from be and the same are in all things affirmed.

Approved for Entry:

XEN HICKS,
Circuit Judge."

We might state also that after the judgment of affirmance, counsel for Carter, the farm debtor, filed his written application for rehearing in the Circuit Court of Appeals and that Court refused to grant any such rehearing and adhered to its former judgment.

V. REPLY ARGUMENT.

On behalf of the secured creditor, George A. Kubler, we do not deem it helpful or advisable, considering the question of fact in issue in this cause, to attempt to reply to all of the presented statements and claimed arguments of counsel for the farm debtor.

Counsel for the farm debtor, in his brief pages 17 to 21 inclusive, under the heading, "Devices to Defeat the Purpose of the Law," and throughout practically all parts of such brief, has charged bad faith on the part of counsel for the secured creditor, the witnesses who testified as to the value of the farm for the secured creditor, the Commissioner before whom the evidence was ordered to be taken, and of the District Court who carefully reviewed all such evidence and fixed and determined the appraised value of the farm, at which price the farm debtor could redeem the same, and failing to do so that a public sale of the farm should be ordered.

Inasmuch as such accusations were likewise urged in the brief of such counsel in the Courts below, and inasmuch as such claims are unsupported by the record evidence, we do not deem it necessary to reply to same.

May we reply to a few of the many assertions made and urged in the brief on behalf of the farm debtor.

1. 1936 Appraisement.

Throughout practically all portions of such brief, comment is made as to the appraisal made by the Commissioner in 1936 for rental and tax purposes during the 3-year moratorium period.

The farm debtor was ordered to pay $150.00 each six months for the reasonable use of the farm lands, and which rental, after about a year and a half from its date, the farm debtor failed to pay.

The rental valuation of $5,800.00 at that time served its purpose, or partly so, and such valuation had nothing to do with the later appraised valuation of the farm for redemption or sale purposes.

Neither counsel for the farm debtor nor counsel for the secured creditor submitted evidence before the Commissioner when such rental valuation was arrived at by the Commissioner, and such proceeding was wholly an ex-parte matter handled by the Commissioner.

2. Statement Made in Commissioner's Report.

Another question is urged throughout opponent's brief to the effect that the Commissioner, in reporting the evidence to the Court for the Court's consideration and judgment, stated in such report that he had also made a personal investigation of the value of the farm, and that by reason of such statement it is urged that all of the subsequent proceedings by the Courts in this cause should be nullified and held to be illegal.

Counsel for the farm debtor is well aware of the real fact that the finding and judgment of Judge Jones is based solely on the evidence as stated in his opinion, and that the same in no respect is based on any statement contained in the Commissioner's report.

3. Time for Redemption.

In several portions of opponent's brief complaint is made that the time stated by the Court for redemption at the appraised value was inadequate and did not afford the farm debtor sufficient opportunity to arrange for such purchase.

Since the farm debtor has continuously contested all orders and judgments made by the Court since the appraised value in 1941 was fixed by the Court, and since a subsequent date would need to be fixed by the trial Court for such redemption, all argument relative to this objection is, as it were, "water over the dam," and, therefore, of no present importance.

VI. EVIDENCE AS TO VALUATION.

For the purpose of considering this petition for writ of certiorari, it may be of no consequence to the Court to have presented any further facts as to the evidence of various witnesses called before the Commissioner for that purpose.

Certainly the evidence was greatly in conflict, and as stated early in this brief, the issue presented to the Court was as to the weight of such evidence.

The record shows that the secured creditor offered four of the five witnesses who were farmers and owners of farms residing in the general vicinity of the Carter farm. They were Walter H. Chamberlain, Russell Osborn, Gilbert L. Huddilston, and H. A. Cochran.

The fifth appraiser was D. A. Scanlon, who for eight years had been an appraiser for the Probate Court of Summit County, Ohio, and also one of the official appraisers for the Sheriff of Summit County, as well as an appraiser for village and city properties.

The witness Chamberlain also in addition to his farm duties was a director of the Northfield Bank in Macedonia and of the Twinsburg Bank, and as such director acted as

one of the appraisers for such banks of farm and village values in the surrounding territory of the Carter farm.

The record also shows that Mr. Huddilston, in the placing of the value of $175.00 per acre, stated that he would pay cash $150.00 per acre for the farm, and that he would expect to make some profit at that price.

The record also shows that Mr. Cochran, in fixing the value of the farm at $200.00 to $225.00 per acre, likewise stated that he would pay cash for such farm at the rate of $175.00 per acre.

The final price fixed in this appraisement by the Court was $119.00 per acre.

Some complaint is made in opponent's brief that some reference was made before the Commissioner that taxes on the farm had not been paid, and that the total indebtedness to the secured creditor then far exceeded the various appraised values, and in that connection may we state that there is absolutely no evidence that any witness to the appraisal value of the farm had any knowledge or information as to the amount of Carter's mortgage debt nor as to the delinquent taxes due on the farm.

VII. CONCLUSION.

In conclusion, may we respectfully submit on behalf of the respondent that since Mr. Carter has held and resided on the farm in question for more than eight years since these bankruptcy proceedings were instituted and has reaped the benefits and income from the use of such farm, and that he has not paid a cent of interest on this mortgage obligation since September, 1931, and that there has been no reduction of the mortgage debt since that time, and that taxes and rental value fixed in 1936 were not even paid, it is certainly not unreasonable, or in derogation of the farm debtor's rights, to have this litigation concluded.

The farm debtor, under the judgment of the Court, has the first right to take the farm in question free of all

claimed indebtedness at the appraised value of $20,000.00, and if such right of purchase be not exercised, then that the farm shall be sold at public sale in accordance with the Bankruptcy Act.

May we further state and submit that all of the just and legal rights of the farm debtor have been carefully and zealously protected by the Court throughout all of this bankruptcy proceeding.

We submit, also, that the rights of the mortgagee, whose money has staked and financed the farm debtor for all these years, are also of equal importance and consideration.

We, therefore, respectfully submit that the writ of certiorari should not issue.

Respectfully submitted,

T. W. KIMBER of

MUSSER, KIMBER & HUFFMAN,

Attorney for Respondent,
George A. Kubler.

February 26, 1943.